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NO. ____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

STATE BOARD OF EQUALIZATION OF THE STATE OF GEORGIA, *et al.*,
*Petitioners*,

v.

SOUTHERN RAILWAY COMPANY, *et al.*,
*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MICHAEL J. BOWERS
Attorney General of Georgia

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

VERLEY J. SPIVEY
Senior Assistant
Attorney General

JAMES C. PRATT
Assistant Attorney General

JOHN A. BLACKMON
Special Assistant
Attorney General

MARION SMITH, II
Special Assistant
Attorney General

*Counsel for Petitioners*

PLEASE ADDRESS ALL COMMUNICATIONS TO:

JAMES C. PRATT
Assistant Attorney General
132 State Judicial Building
Atlanta, GA 30334
(404) 656-4168

## QUESTIONS PRESENTED

1. May Congress forbid district courts from abstaining in cases otherwise within *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)?

2. In enacting § 306 of Pub. L. 94-210, 49 U.S.C. § 11503, did Congress intend to forbid abstention in cases brought by railroads to enjoin allegedly discriminatory state taxation of railroad property?

3. Assuming that § 306 does not absolutely bar abstention, did the district court nevertheless abuse its discretion in this case?

## PARTIES

The parties to this Petition are the State Board of Equalization of the State of Georgia and Marcus E. Collins, Sr., Michael J. Bowers, Jimmy Lester, William M. Nixon, Jr., and Joe Mack Wilson, the current members of the Board, as Petitioners; Southern Railway Company, The Alabama Great Southern Railway Company, Central of Georgia Railroad Company, The Georgia Northern Railway Company, Georgia Southern & Florida Railway Company, Live Oak, Perry and South Georgia Railway Company, Tennessee, Alabama and Georgia Railway Company, Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company, and the United States of America, as Respondents.

In their Brief in the Court of Appeals the Respondent railroads listed, as parties having an interest in the outcome of this case, more than 200 subsidiaries and affiliates. Petitioners believe that these parties do not have a separable interest in the outcome of this case and are supplying their names in a letter addressed to the Clerk, rather than listing them here.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, State Board of Equalization of the State of Georgia, Marcus E. Collins, Sr., Michael J. Bowers, Jimmy Lester, William M. Nixon, Jr., and Joe Mack Wilson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on September 19, 1983.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 715 F.2d 522 and appears as Part I of the Appendix hereto. The orders of the United States District Court for the Northern District of Georgia, dismissing the action and denying motions to reconsider, are not reported and appear as Parts II and III of the Appendix hereto.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 19, 1983, and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (1976) ("§ 306"), insofar as it is directly pertinent to the abstention issue presented by this case, provides as follows:[1]

> It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or political subdivision to . . . [assess], for purposes of a property tax levied by any taxing district, [railroad] property at a value which bears a higher ratio to the true market value of such [railroad] property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property. * * *
>
> (2) Notwithstanding any provision of Section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunc-

[1] The complete text of § 306, including definitions and other material, appears as Part IV of the Appendix hereto. The text reproduced here and in the Appendix is the original statutory text, not the text codified in 1978 as 49 U.S.C. § 11503. Pub. L. No. 95-473, 92 Stat. 1337, 1445-46 (1978). The parties to this case and most courts, including the Court of Appeals below, agree that the original text is authoritative. Appendix 2a n.1.

tive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain or terminate any acts in violation of this section. . . ."

## STATEMENT OF THE CASE

In October 1979, each of the Respondent railroads appealed the assessment of its Georgia property for tax year 1979 to the Petitioner State Board of Equalization and specifically claimed an entitlement to relief under § 306 as well as under state law. Each railroad agreed that the State Board had jurisdiction to grant relief based upon § 306, and actively litigated its § 306 cause of action before the State Board. The State Board's disposition of the § 306 and state law claims could have been appealed (and can still be appealed) to a single state court, with ultimate review of any federal question in this Court.

All of the railroads' property, wherever located in the State of Georgia, was encompassed in the State Board proceeding. A hearing on the appeal was held before a hearing officer whose appointment by the State Board was consented to by the railroads. The hearing lasted six days and produced a 1400 page transcript and voluminous exhibits. Extensive post-trial briefs were filed and the hearing officer ultimately rendered his proposed findings of fact and conclusions of law on January 5, 1981. The hearing officer recommended that the railroads be awarded relief on their state law equalization claims, but be denied relief on their state law valuation claims and their § 306 claims. The hearing officer denied the § 306 claims because the railroads presented no evidence on the assessment ratios of commercial and industrial property, the comparison class of property specified by § 306.

The state and the railroads both filed exceptions to the hearing officer's proposed findings and conclusions.

The state in its exception argued that a December 1980 decision of the Georgia Supreme Court, *Strickland v. Douglas County*, 246 Ga. 640, 272 S.E.2d 340 (1980), approved the state's annual tax equalization procedure, making it clear that the railroads were not entitled to an additional adjustment in the State Board proceeding. The railroads in their § 306 exception argued that a tax district's "all property" assessment ratio (the ratio determined by examining assessments of all types of locally assessed real property in a jurisdiction) is conclusively presumed by state law to be the same as its "commercial and industrial" assessment ratio (the ratio determined by examining assessments of non-railroad commercial and industrial property in a jurisdiction).

The State Board met on April 14, 1981, to hear arguments of counsel, then adjourned and reconvened on April 15. The State Board applied *Strickland v. Douglas County, supra*, and accordingly denied the railroads relief on the state law equalization claims. The remaining recommendations of the hearing officer were adopted. With respect to the § 306 claims, the State Board concluded that there was no state law presumption equating "all property" ratios with "commercial and industrial" ratios, and accordingly concluded that the railroads had presented no evidence under § 306.

About an hour after the State Board voted on its decision, and before a written order was prepared, the railroads filed suit in the United States District Court for the Northern District of Georgia, seeking declaratory and injunctive relief against alleged violations of § 306. Jurisdiction was predicated upon 28 U.S.C. § 1331, 28 U.S.C. § 1337, and § 306 itself. The railroads moved for a temporary restraining order, relying in part upon the

supposed state law presumption that had just been argued before the State Board. A temporary restraining order was entered, and the State Board has from that moment been enjoined from issuing its written order.

The State Board in its answer raised, *inter alia*, defenses based upon abstention and the Tenth Amendment.[2] The United States moved to intervene on June 8, 1981, to sustain the constitutionality of § 306 and to enjoin practices alleged to violate § 306. Intervention was ordered on June 13, 1981, and the State Board answered the complaint of the United States on June 14, raising the same defenses raised in its answer to the railroads' complaint.

On May 26, 1981, the State Board moved to dismiss the case on the grounds that the District Court should abstain from exercising its jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and its progeny. On August 27, 1981, the district court entered its Order (reproduced as Part II of the Appendix hereto).

The District Court discussed the particular facts and circumstances of the case in detail, finding that state court review of the § 306 claim would be adequate, Appendix 31a, and indeed that the type of review available to the railroads had been specifically approved for abstention purposes by *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 349 (1951). Appendix 24a n. 2. The District Court found that taxation is one of the most basic functions of state and local government, Appendix 30a, and that a federal court injunction

[2] A Tenth Amendment issue was being litigated at the time by the State of Tennessee but was later effectively resolved in favor of § 306. *State of Tennessee v. Louisville & Nashville R.R.*, 478 F.Supp. 199 (M.D. Tenn. 1979), *aff'd* 652 F.2d 59 (6th Cir.), *cert. den.* 454 U.S. 834 (1981).

would unnecessarily intrude into state property tax administration. Appendix 31a.

The District Court found that Georgia law mirrors federal law in requiring that railroad property be taxed uniformly with other property (including commercial and industrial property), and that therefore the dispute was essentially over opinions of value. Appendix 28a. With respect to questions of property valuation, the District Court found that the state possesses special expertise, Appendix 31a, and that a state court could more effectively require compliance with § 306 because of the limits placed upon district court assessing activities by *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961). Appendix 32a-33a.

With respect to the § 306 cause of action, the District Court noted that jurisdiction of § 306 cases lies concurrently in state and federal court, Appendix 30a, and that the railroads had voluntarily elected to pursue their § 306 claim on the merits in a state forum prior to filing suit in district court. Appendix 32a. In the exercise of its discretion, the District Court concluded that abstention was proper and dismissed the case in favor of the ongoing state proceedings. Appendix 33a.

Motions to reconsider were filed by all parties and denied on October 9, 1981 (order reproduced as Part III of the Appendix hereto). The State Board objected to continuation of the temporary injunction pending appeal, on the ground that the railroads should be required to pay their undisputed tax liability. Appeals followed, and on September 19, 1983, the United States Court of Appeals for the Eleventh Circuit reversed the District Court on both the appeal and cross-appeal. The Court of Appeals in its opinion (reproduced as Part I of the Appendix

hereto) held that *Burford* abstention is barred in § 306 cases, Appendix 9a, and therefore did not find it necessary to discuss disruption of state taxation, state expertise, adequacy of state court review, or most of the other *Burford* factors considered by the district court. The Court of Appeals found that Congress intended to carve out an exception to the doctrine of equitable restraint in cases brought pursuant to § 306. Appendix 14a. The Court of Appeals stated that the province of the judiciary in this area is to implement congressional policy, Appendix 14a, as opposed to "its own notions of comity and federalism." Appendix 16a n. 14.

## REASONS FOR GRANTING THE WRIT

### 1. The Court of Appeals' conclusion, that *Burford* abstention involves nothing except congressional policy, is in conflict with principles stated in decisions of this Court, a conflict which is of sufficient importance to warrant review by this Court.

In its opinion, the Court of Appeals below concluded that a district court may not abstain unless doing so is consistent with congressional intent. This conclusion is in conflict with a half century of Supreme Court jurisprudence and is important enough to call for review and correction by this Court.

#### a. Conflict with principles stated in Supreme Court decisions.

In *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943), this Court held that federal district courts may decline to exercise their jurisdiction to enjoin certain state activities, and thereby make their own contribution to the "harmonious relation between state and federal authority." The dissenters advanced the idea that the province

of the judiciary in determining whether to abstain is simply to implement congressional policy:

> "The duty of the judiciary is to exercise the jurisdiction which Congress has conferred. What the Court is doing today I might wholeheartedly approve if it were done by Congress." 319 U.S. at 348 (Frankfurter, J., dissenting).

The majority disagreed, holding that courts may exercise their equitable powers to give "proper regard for the rightful independence of state governments in carrying out their domestic policy," *Id.* at 318, and therefore are not limited to congressional policy in determining whether to exercise jurisdiction in a particular case.

Subsequent cases have confirmed that the judiciary has an independent role to play in this area, and should consider nonstatutory matters, including comity and federalism, in determining whether or not to abstain. *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951); *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981). Indeed, a commentator has stated that Justice Frankfurter apparently abandoned his position in *Burford* when, writing for the Court in *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959), he recognized state autonomy as a basis for sustaining a district court which had abstained. *See* Comment, "Scope of the Burford Doctrine," 46 U.Chi. L.Rev. 971, 989-90 n. 104 (1979).

Despite these authorities, the Court of Appeals below concluded that if Congress intended to offer a suitor a choice of forum then a district court may not decline to exercise its jurisdiction. According to the Court of Appeals, it is an abuse of discretion to consider comity and federalism or to weigh the extent to which a district

court injunction would disrupt state activities, displace state expertise and preempt adequate state court review of an issue. The opinion below states its absolutist view of this matter three times: "we conclude that the statute bars abstention," Appendix 9a; "Since Congress has spoken, it is not our province to alter the balance Congress struck," Appendix 14a; "We conclude that the recent, specific expression of congressional intent and national policy reflected in [§ 306] requires federal courts to hear [§ 306] cases brought before them." Appendix 16a-17a.[3]

The Court of Appeals attempted to reconcile its decision with *Fair Assessment in Real Estate Association v. McNary, supra*, a recent decision of this Court which approved abstention in a § 1983 challenge to state property tax assessment practices. The State Board submits, however, that the decision below is in clear conflict with *Fair Assessment*. The Court of Appeals interpreted *Fair Assessment* in terms of the strength of the congressional policy favoring a federal forum to adjudicate that particular variety of civil rights suit. The Court of Appeals stated that *Fair Assessment* approved abstention because the economic due process claims in *Fair Assessment* "fell at the extreme periphery of the concern behind section

[3] Two footnotes seem to state a contrary rule: "We refuse to accept . . . the railroad's argument that the courts are prevented from exercising equitable discretion because of a contrary expressional of congressional intent." Appendix 11a n. 12; "This case presents no compelling reason for the court to ignore Congress' intention," Appendix 16a n. 14 (suggesting that such reasons might exist). Moreover, the opinion below states generally that equitable restraint may continue to justify abstention in state tax cases falling outside of the Tax Injunction Act of 1937, 28 U.S.C. § 1341. Appendix 10a-11a. However, in light of the Court of Appeals' refusal to even discuss most of the factors considered by the District Court, it is fair to say that the Court of Appeals concluded that abstention is absolutely barred unless Congress has at least acquiesced in it.

1983," Appendix 15a, but this Court's opinion provides scant support for the Court of Appeals' interpretation. Indeed, if *Fair Assessment* were really limited to the intent of Congress then most of this Court's discussion was pointless. In refusing to dispose of *Fair Assessment* under the Tax Injunction Act of 1937, 28 U.S.C. § 1341, this Court took special care to establish that comity and federalism are always to be considered in *Burford* abstention cases, irrespective of whether the statutory indications favor or disfavor abstention.

Moreover, the opinion below conflicts in principle with *Alabama Public Service Commission v. Southern Railway Co., supra*, a case principally relied upon by the State Board but not cited by the Court of Appeals. In its discussion, the Court of Appeals noted that § 306 contains a specific exception to 28 U.S.C. § 1341. Appendix 6a, 12a. Largely because of this exception, the Court of Appeals found that "Congress meant unconditionally to ensure a federal forum for section [306] claims." Appendix 9a. Viewing this intent as dispositive, the Court of Appeals concluded that § 306 "bars abstention." *Id.*

It is true that the exception to 28 U.S.C. § 1341 distinguishes § 306 from the provisions of law involved in *Burford* and *Fair Assessment*, but *Alabama Public Service Commission v. Southern Railway Co., supra*, establishes that abstention is not barred by enactments similar to § 306. Southern Railway filed suit in district court to enjoin enforcement of an order of the Alabama Public Service Commission denying Southern a permit to reduce passenger service on an allegedly unprofitable route. Finding state law violations and out-of-pocket losses amounting to confiscation of property in violation of the Due Process Clause of the Fourteenth Amendment, a

three-judge court entered judgment voiding the Commission's order and enjoining any action against Southern for discontinuing trains. The district court gave scant attention to the Commission's motion to dismiss based upon *Burford* abstention, holding that "rules of comity are inapplicable" in that type of case. *Southern Railway Co. v. Alabama Public Service Commission*, 91 F.Supp. 980, 985 (M.D. Ala. 1950) (three-judge court).

The Commission appealed and argued, *inter alia*, that the district court was required to abstain under *Burford v. Sun Oil Co.*, *supra*. Southern responded by discussing Congress' detailed restriction of federal court injunctions,[4] reasoning in effect that Congress, by restricting the ability of district courts to enjoin certain actions, impliedly commanded district courts to exercise their jurisdiction in cases falling outside of the restrictions. The strongest negative inference arose from the Johnson Act, 28 U.S.C. § 1342, which abridged district court jurisdiction to enjoin the rate orders, but not the service orders, of state public service commissions. This Court, however, concluded that abstention was not precluded:

> The Johnson Act, 48 Stat. 775 (1934) now 28 U.S.C. (Supp. III) § 1342, does not affect the result in this case. That Act deprived federal district courts of jurisdiction to enjoin enforcement of certain state administrative orders affecting public utility rates where "A plain, speedy and efficient remedy may be had in the courts of such State." As the order of the Alabama Service Commission involved in this case is not one affecting appellee's rates, the Johnson Act

[4] Southern referred to 28 U.S.C. § 1341, 28 U.S.C. § 1342 and 28 U.S.C. § 2284. *See* Brief for Appellee at 28-29 in *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 363 (1951), a companion case. This argument was incorporated by reference into Southern's brief in the principal case.

> is not applicable. We have assumed throughout this opinion that the court below had jurisdiction, *supra*, p. 345, but hold that jurisdiction should not be exercised in this case as a matter of sound equitable discretion. 341 U.S. at 350.

The 28 U.S.C. § 1342 argument rejected in *Alabama Public Service Commission v. Southern Railway Co., supra*, is virtually identical to the 28 U.S.C. § 1341 argument accepted by the Court of Appeals below, making clear the conflict in principle between the two decisions.

The foregoing review of *Burford* abstention cases suggests that district courts considering abstention should not passively implement congressional policy, and that the Court of Appeals' decision to the contrary is in conflict with a half century of Supreme Court jurisprudence. However, the Court of Appeals cites two decisions of this Court, *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), Appendix 14a-16a, so it should be made clear that these decisions did not resurrect the position of the *Burford* dissenters.

*Patsy* held that the exercise of federal jurisdiction in § 1983 cases would not be deferred pending exhaustion of state administrative remedies, and did so largely because deferral would be inconsistent with legislative intent. However, this Court also recognized as a matter of principle that exhaustion requirements could be imposed by the judiciary. *Id.* at 501. Moreover, deferral is substantially different from dismissal, the result of *Burford* abstention. *Patsy* does not indicate any general dissatisfaction with *Burford* abstention, or even with dismissing § 1983 cases on grounds of abstention, as was ordered in *Fair Assessment in Real Estate Association v. McNary, supra.*

In *Moe*, according to the Court of Appeals, a jurisdictional statute "properly took precedence over the equitable restraint doctrine," leading this Court to decide "that abstention in the case was improper." Appendix 15a. In rereading *Moe*, however, the State Board was unable to find any mention of equitable restraint or abstention in the opinion of this Court or in either of the trial court decisions. *See* 392 F. Supp. 1297 and 392 F. Supp. 1325. The State Board submits that *Moe* provides no support for the Court of Appeals' notion that jurisdictional statutes may preclude district courts from abstaining in appropriate cases.

**b. Importance of the issue.**

The decision of the Court of Appeals undermines the entire concept of abstention. Apparently for the first time, a federal appellate court has instructed the district courts in its circuit that it is an abuse of discretion to fail to passively implement congressional policy. The decision prohibits a district court from considering "its own notions of comity and federalism," Appendix 16a n. 14, in determining whether or not to abstain.

The approach of the decision below is, by its nature, not limited to § 306 or *Burford* abstention. If district courts must disregard comity and federalism in this context, then, by a parity of reasoning, they must disregard comity and federalism in other contexts as well. The Court of Appeals stated that its approach applies to "abstention in all its forms," Appendix 14a, and it is to be expected that, as precedent in the Eleventh Circuit and persuasive authority elsewhere, the Court of Appeals' decision will be applied as written.

The Court of Appeals' decision represents a radical departure from principles established by this Court to

govern one of the most sensitive aspects of our constitutional system. Acceptance of the Court of Appeals' approach will prevent the judicial branch of government from making its own contribution to the "harmonious relation between state and federal authority," *Burford v. Sun Oil Co., supra,* 319 U.S. at 333, in an area of long-standing and deep concern to this Court.

Even if the decision below could somehow be limited to § 306 cases, this case would nevertheless warrant Supreme Court review. As the first appellate decision on this important aspect of § 306, the decision below will likely be followed in other circuits. The Court of Appeals acknowledged that § 306 cases, while they may only be filed by owners of rail transportation property, are apt to involve large amounts of revenue. Appendix 13a. The case *sub judice* involves only a single state and a single tax year, but still encompasses railroad property located in Georgia valued at more than $478 million and a disputed principal tax liability of $1.5 million. Railroads have filed § 306 cases in more than 20 states [4] and new

[4] As the Court of Appeals noted, Appendix 17a n. 15, several district courts in other circuits have considered abstention in § 306 cases. While most of the courts have declined to abstain, this does not indicate disagreement with abstention in the case *sub judice*. *Atchison, T. & S.F. Ry. v. Lennen*, 552 F.Supp. 1031 (D. Kan. 1982), while listed by the Court of Appeals below as the one case "disapproving" the district court order below, actually found the Georgia order only to be inapplicable to "the circumstances of this case." *Id.* at 1038. The Kansas District Court based its decision upon Kansas's status as a severe historical discriminator, *Id.* at 1037, which precludes the use of sales ratio data, *Id.* at 1048 n. 14, and provides extremely limited state law equalization. *Id.* at 1036. Most importantly, the court found Kansas to offer railroads state court review which is "uncertain at best." *Id.* at 1038. The Kansas District Court's careful consideration of abstention factors is inconsistent with the absolutist rule announced by the Court of Appeals below, and does not criticize, much less find an abuse of discretion by, the District Court below.

suits will tend to appear in annual waves because property tax assessment is an annual process. All of these factors suggest that the potential for federal-state friction in § 306 litigation is very great and warrants the grant of the writ.

**2. The Court of Appeals' conclusion, that Congress intended to forbid abstention in § 306 cases, is clearly in error and is of sufficient importance to warrant Supreme Court review.**

The Court of Appeals gave two reasons for concluding that Congress intended to forbid abstention in § 306 cases, but such a conclusion follows neither from Congress' suspension of 28 U.S.C. § 1341, Appendix 12a, nor from the legislative history. Appendix 14a. The Court of Appeals' decision represents the first construction by an appellate court of this aspect of this important legislation, and warrants Supreme Court review.

The negative inference from 28 U.S.C. § 1341 is a poor guide to the legislative intent respecting abstention because the standards for 28 U.S.C. § 1341 and abstention, while they both involve adequacy of state review, are markedly different in other respects. Unlike 28 U.S.C. § 1341, abstention is discretionary and involves consideration of a variety of additional factors which may vary from case to case. Moreover, a similar inference was involved in *Alabama Public Service Commission v. Southern Railway Co.*, *supra*, and rejected entirely by this Court. *Supra* at 10-12.*

* If a negative inference is to govern this case, it would be better to draw it from the phrase "Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any state," taken as a whole. By specifically naming three sources of law, the quoted phrase impliedly excludes others, includ-

It is impossible in a petition for certiorari to discuss in detail the voluminous 15-year legislative history of § 306 and its forerunner bills. Suffice it to say that the Court of Appeals, while citing to legislative reports elsewhere in its opinion, gives no citation for its conclusion that Congress intended to preclude abstention in § 306 cases. Indeed, the railroads have never suggested that a reference to abstention appears anywhere in the history, and the State Board believes there is none.

On the contrary, the legislative history indicates that Congress was primarily concerned with the practice of some states of requiring a railroad to file suit in dozens of jurisdictions in order to adjudicate its claim:

> "Access to the Federal courts to obtain relief from acts declared to be unlawful by the measure is a secondary, but necessary, part of the measure. Carriers are necessarily located in many taxing jurisdictions. Without this measure's provision for action in the Federal district courts, they might be required to bring a multiplicity of suits to obtain justice." S. Rep. 92-1085 at 8.

Congress noted that the Southern Pacific and its affiliates were required to bring 48 separate suits in 48 separate California superior courts to challenge the level of assessment of its railroad property, and that burdensome multiple suit requirements are often held not to violate the "plain, speedy and efficient" requirement of 28 U.S.C. § 1341. *Id.* at 5. This problem, however, has not existed in Georgia at least since 1966, when *Undercofler v. Seaboard Air Line Railroad Co.*, 222 Ga. 822, 152 S.E.2d 878 (1966), granted a major railroad statewide equaliza-

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ing abstention. If Congress had intended to foreclose abstention in § 306 cases it presumably would have said so in the quoted phrase. *See American Bank and Trust Co. v. Dallas County*, 463 U.S. ___ (1983) (slip op. at 8).

tion relief in a single proceeding. Under the current Georgia statute it is clear that this entire litigation would be heard in a single proceeding. *See* Off. Code Ga. Ann § 48-2-18(e) (1983).

Congress was also concerned with *de jure* discrimination against railroad property, *Id.* at 6 (the District Court concluded that this was Congress' principal concern, Appendix 31a), and with unreasonable standards of proof and ineffective remedies in state court equalization proceedings. None of these problems exists in Georgia, a uniform taxation state which has for many years recognized ratio study evidence and adjusted railroad assessments in the same manner as § 306. *See Undercofler v. Seaboard Air Line Railroad Co., supra.*

A railroad industry witness once suggested that state courts may be reluctant to disagree with assessors, S. Rep. 91-630 at 7, but this cannot be characterized as one of Congress' central concerns and there is in any event no basis to apply it to Georgia. The District Court found that state judicial review would be adequate in this case. Appendix 31a. The railroads have not disputed this finding or pointed to a single instance in which they contend railroad property was improperly valued, or equalization was improperly denied, in a Georgia state court proceeding.

The decision of the Court of Appeals is the first construction by an appellate court of this aspect of this important legislation. The construction ignores the approach of this Court in *Alabama Public Service Commission v. Southern Railway Co., supra,* and is inconsistent with the legislative history. The likely effect of this misconstruction on subsequent cases, in the Eleventh Circuit and in other circuits, warrants the grant of the writ.

**3. The District Court did not abuse its discretion in abstaining under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).**

Analyzing the case *sub judice* in terms of the factors set forth in *Burford v. Sun Oil Co., supra*, and its progeny, there is no basis for concluding that the District Court abused its discretion. The Court of Appeals did not take issue with the District Court's detailed and careful weighing of the *Burford* factors, except in the following comment in a footnote to its opinion:

> "This case presents no compelling reason for the court to ignore Congress' intention and refuse to exercise its duly conferred jurisdiction." Appendix 16a n. 14.

As to what the Court of Appeals would consider to be a "compelling reason," properly cognizable by a district court, perhaps the Court of Appeals regards an injunction against state taxes as insufficiently disruptive to support abstention, even where, as here, the injunction allowed the railroads to retain over $4 million in undisputed principal tax for more than two years,[7] and has delayed an adjudication on the $1.5 million in principal tax that is in issue.

It is difficult for the State Board to conceive of a more disruptive injunction, and even the Court of Appeals conceded the importance of tax revenues to state and local governments. Appendix 10a. Moreover, a failure to abstain in Georgia could lead to recurring suits in state and federal court for a single year, as the lowering of rail-

[7] State law requires all taxpayers to pay past due undisputed amounts prior to filing suit in state court. Amounts in dispute are not required to be paid. Off. Code Ga. Ann. § 48-2-59(c). This procedure is fair to taxpayers but minimizes disruption of state and local government.

road taxes by federal court order, based upon its evaluation of the experts' opinions, could give rise to a new claim in other taxpayers to have their taxes equalized under state law. Then the railroads could return to federal court for a readjustment, and so on. Disruption is an important factor under *Burford v. Sun Oil Co.*, *supra*, and the foregoing process would be disruption with a vengeance.

Perhaps the Court of Appeals feels that state expertise in the area of property taxation would be matched by its district court judges. The opinion of the Court of Appeals, however, gives no hint of the extraordinary complexity of valuing the property of a major railroad, or of the difficulty of determining the prevailing level of assessment in hundreds of local taxing jurisdictions. The district court, in contrast, made specific reference to the 1400 page transcript, voluminous exhibits and extensive briefs filed with the State Board. Appendix 25a. Moreover, it is not clear that the Court of Appeals understood that the railroads intend to rely upon a supposed presumption of state law in order to prove their § 306 case, and have raised pendent state law claims. The existence of state law issues is a factor favoring dismissal of a federal suit in favor of state proceedings. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 820 (1976); *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963).

The Court of Appeals did disagree with the District Court that *Moses Lake Homes, Inc. v. Grant County*, *supra*, renders a federal court less effective than a state court as a § 306 forum. Appendix 8a n. 9. The State Board submits that this case involves the precise evil condemned in *Moses Lake Homes*, and notes that when

§ 306 and its forerunner bills were pending in Congress the Justice Department agreed with the District Court, advising Congress three times that partial injunctions under § 306 would probably be unconstitutional. *See* S. Rep. No. 1483 at 16-17; S. Rep. No. 91-630 at 19. Congress ignored the warnings and § 306 contains the feature found objectionable by the Justice Department.

Finally, it should be noted that the decision of the Court of Appeals gives railroads a right to two independent trials on a single cause of action. Witnesses and litigation strategies can be test-run before the State Board, and then reused or abandoned in federal court if the state administrative results do not suit the railroads. The Court of Appeals suggested that this incredibly wasteful procedure "will serve the principles of comity" because a satisfactory result before the State Board would probably obviate the federal suit, Appendix 5a n. 6. The state, however, does not feel accommodated by a rule which gives its litigation opponents two bites at the apple. The error of the Court of Appeals, in finding an abuse of discretion on the part of the District Court, is clear and substantial and this warrants the grant of the writ.

## CONCLUSION

For the reasons stated, we respectfully request that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

VERLEY J. SPIVEY
Senior Assistant
Attorney General

JAMES C. PRATT
Assistant Attorney General

JOHN A. BLACKMON
Special Assistant
Attorney General

MARION SMITH, II
Special Assistant
Attorney General

*Counsel for Petitioner*

Please address all correspondence to:

JAMES C. PRATT
132 Judicial Bldg.
40 Capitol Square
Atlanta, GA 30334
404/656-4168

## CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Petition for a Writ of Certiorari upon counsel for all parties who are separately represented, pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, by mailing three copies to each in envelopes addressed to:

Charles T. Zink, Esq.
Hansell & Post
3300 First National Bank Tower
Atlanta, Georgia 30383
*Counsel of Record for Respondent Railroads*

Hon. Rex E. Lee
Solicitor General
Department of Justice
Washington, D. C. 20530
*Counsel for Respondent United States of America*

with first-class postage prepaid. All parties required to be served have been served.

This ____ day of _____, 1983.

JAMES C. PRATT
Assistant Attorney General

132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4168

# APPENDIX

# PART I

## APPELLATE COURT DECISION

**SOUTHERN RAILWAY COMPANY, et al., Plaintiffs-Appellants, Cross-Appellees,**

**United States of America, Plaintiff-Appellant,**

**v.**

**STATE BOARD OF EQUALIZATION, etc., et al., Defendants-Appellees, Cross-Appellants.**

**No. 81-7925.**

United States Court of Appeals, Eleventh Circuit.

Sept. 19, 1983.

Appeals from the United States District Court for the Northern District of Georgia.

Before FAY and VANCE, Circuit Judges, and ALLGOOD*, District Judge.

VANCE, Circuit Judge:

In this case we are asked to decide whether the district court properly abstained from hearing a case brought before it under section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. No. 94-210, 90 Stat. 31, 54 (1976) (codified with some differences in

*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

language at 49 U.S.C. § 11503) (the 4R Act or the Act).[1] That provision prohibits a state or subdivision thereof from assessing rail transportation property at a value that has a higher ratio to the true market value of that property than does the assessed value of other commercial and industrial property in the state or subdivision. Section 11503 of the codified 4R Act also makes it unlawful to levy or collect taxes on rail property assessed in this discriminatory manner. The section confers concurrent jurisdiction on federal district courts to enforce its provisions.

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[1] Section 306 of the 4R Act was originally codified in the Interstate Commerce Act at 49 U.S.C. § 26c. Although the Act became law on February 5, 1976, the effective date of section 306 was set for three years after that date to give the states time to bring their property tax laws into conformity with the Act. Pub.L. No. 94-210, 90 Stat. 31, 54 (1976) (originally codified at 49 U.S.C. § 26c(2)(b)). In the intervening period the Revised Interstate Commerce Act of 1978, Pub.L. No. 95-473, 92 Stat. 1337 (1978) recodified subtitle IV of the Interstate Commerce Act placing section 306 of the 4R Act at 49 U.S.C. § 11503. 92 Stat. at 1337, 1445-46. Despite the recodification's major changes in the wording of section 306 the stated legislative purpose of the Revised Interstate Commerce Act was to make changes in terminology and style without causing any substantive change. H.R.Rep. No. 1395, 95th Cong., 2d Sess. 9-10, *reprinted in* 1978 U.S. Code Cong. & Ad.News 3009, 3018-19. *See also* H.R.Rep. No. 1395 at 8, *reprinted in* 1978 U.S.Code Cong. & Ad.News at 3017 (letter of Edward F. Willett, Jr., Law Revision Counsel, placed in the report by Committee Chairman Rodino):

> Under the proviso of section 204(a) of title 1, positive law titles of the United States Code are legal evidence of the law. Even if the language used in the codification *appears* to make a substantive change, the courts will look to the predecessor statute and legislative history if necessary to interpret the language of the codification.

(emphasis in original). We shall read section 11503 in light of section 306 and the legislative history resolving ambiguities in favor of the original language. *Cf. Atchison, T. & S.F. Ry. v. Lennen*, 640 F.2d 255, 258 (10th Cir.1981). The approach fulfills the purpose of the recodification which was to attain uniformity within the title and reduce awkward and obsolete terms without affecting the substance of any previously enacted statutes.

I. Preliminary Matters.

The private appellants in this case are nine interstate rail carriers (the railroads) owning property in the state of Georgia.[2] Relying on a sales ratio study prepared by the Georgia Department of Audits which showed that, in the aggregate, local nonrailroad property in many Georgia counties in 1979 was preferentially assessed at a value far below the forty percent of fair market value required by state law the railroads brought this action in federal district court to enjoin the issuance by the Georgia State Board of Equalization (the state board) of an order which allegedly would result in the assessment of their property in a discriminatory manner.

Prior to bringing this suit the railroads appealed their proposed assessments for 1979 to the state board under the procedure Georgia provides for that purpose. *See* Ga.Code Ann. § 48-2-18 (1982), *amended by* § 48-2-18 (Supp.1983); Ga.Code Ann. § 48-2-46 (1982).[3] The designated hearing examiner rejected claims made by some of the railroads that their property was valued far in excess of its true market value but found on the basis of the sales ratio study that many counties discriminatorily assessed local nonrailroad property below the forty per-

[2] In its answer to the railroads' complaint the state board challenged the constitutionality of section 11503. Consequently the United States requested and was granted leave to intervene pursuant to 28 U.S.C. § 2403(a) (1976) in order to defend the Act. After the United States intervened the state board abandoned its direct attack on the Act's constitutionality. This abandonment is, however, partial. The state board still argues that under *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed.2d 66 (1961), a federal court cannot constitutionally grant the relief mandated by the Act.

[3] In 1982 Georgia recodified its laws. Although at all times relevant to this appeal the old code was in effect, for convenience all citations to Georgia laws are to the new condification. Any discrepancies between the old and new codes are not relevant to this appeal.

cent of true market value required by law. As a consequence, the examiner recommended that the assessment percentages applied to each railroad's system value be reduced correspondingly in those counties.[4]

On April 15, 1981, in summary fashion, the state board approved and accepted all recommendations of the examiner except those which would eliminate the disparity between locally assessed property and rail property in the counties where the ratio study showed locally assessed property to be undervalued. The board gave no reasons for this rejection but implicitly ruled that, despite the significant discrepancies evidenced by the sales ratio study, the county assessments were "reasonably uniform" under Georgia law.[5] After the board announced its de-

[4] In his report and recommendation the hearing examiner discussed section 306 of the 4R Act but found it inapplicable because "[t]he railroads offered no evidence of the prevailing level of assessment of commercial and industrial property in the State as a whole or in any county. Absent such evidence the prevailing level of assessment for such property as a discrete class is presumptively at 40% of value. *Hardin v. Reynolds*, 189 Ga. 534, 6 S.E.2d 328 (1939). Hence, the discrimination prohibited by 49 U.S.C. § 11503 has not occurred." Thus the hearing examiner based his recommendation of equalization, which the state board refused to adopt, not on federal law but on state law. We further note that section 11503 may shift the burden to the state to show that all other commercial and industrial property was properly assessed after presentation of the sales assessment ratio showing the railroad's assessment value exceeded that of all other property. *See Clinchfield R.R. v. Lynch*, 700 F.2d 126, 132-34 (4th Cir. 1983). Regardless of the possibility of burden shifting, where a more specific ratio study is unavailable, a general ratio such as the one used by the railroads in this case showing a five percent assessment discrepancy is a sufficient ground for jurisdiction although not necessarily conclusive of the actual discrepancy existing or the measure of relief to be granted if adequately rebutted by the state board. *See Clinchfield R.R. v. Lynch*, 527 F.Supp. 784 (E.D.N.C.1981), *aff'd*, 700 F.2d 126 (4th Cir.1983).

[5] It is unclear under Georgia law what percentage discrepancy between railroad assessments and the average assessment of all other commercial and industrial property within a taxing subdivision would be sufficient to show as a matter of law that the railroads deserved equalization.

cision but before it could issue an order the railroads filed this action.[6] The district court's subsequent restraining orders and injunctions continue to prevent the board from issuing its order assessing the railroads property taxes.[7]

II. Property Tax Assessment in the State of Georgia.

The Georgia state revenue commissioner assesses utilities including railroads centrally. *See* Ga.Code Ann. §§ 48-5-510 through -524 (1982). Other commercial and industrial property is assessed by the county in which it is located. These local assessments are performed by the various county boards of tax assessors. *See* Ga.Code Ann. §§ 48-5-290 through -313 (1982 & Supp.1983). The state

[6] The fact that the state proceeding was still in progress when appellants sued in federal district court does not affect the district court's jurisdiction. *See, e.g., Colorado River Water Conservation Dist.*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976); *Ramos v. Lamm*, 639 F.2d 559, 565 (10th Cir.1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981). The state board argues that the railroads should be confined to the state forum because that is where they chose to raise the section 11503 claim. The railroads argue that, under *Missouri Pacific Railroad v. Tax Division*, 504 F.Supp. 907 (E.D.Ark.1980), they feared their section 11503 claim would otherwise be deemed waived. The combination of the election of remedies doctrine advanced by the state board and the possibility of waiver under *Missouri Pacific* would effectively deprive federal courts of jurisdiction to hear section 11503 cases contrary to congressional intent. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-50, 94 S.Ct. 1011, 1019-1020, 39 L.Ed.2d 147 (1974) (Title VII cause of action not forfeited by arbitration of grievance under nondiscrimination clause of collective bargaining agreement). Although we need not decide the waiver issue we conclude that the railroads are not barred from advancing their claims by the doctrine of election of remedies and may proceed in federal court despite raising the identical claims in a state proceeding. This result will serve the principles of comity by encouraging railroads to bring all their tax claims first in the state tribunal. This may, if effective relief is forthcoming, eliminate the necessity for federal adjudication.

[7] Since no final order has been issued the board's determination of the section 11503 issue is not res judicata and does not bind the district court.

revenue commissioner by law must require all counties to assess property uniformly. *Hawes v. Conner*, 224 Ga. 567, 163 S.E.2d 724, 726 (1968). The degree of uniformity required is styled "reasonable uniformity." *See Strickland v. Douglas County*, 246 Ga. 640, 272 S.E.2d 340, 342 (1980). The commissioner's decision that assessments within a given county should be increased, decreased or left unchanged must be upheld by reviewing courts unless the action is "unreasonable, beyond his authority or constitute an abuse of discretion." *Id.*

III. Protections Afforded Railroads by the 4R Act.

Section 11503 grants federal courts concurrent jurisdiction to impose sanctions once a railroad shows that the ratio of assessed value to true market value of its property exceeds by at least five percent the assessed value to true market value of other commercial and industrial property within the taxing jurisdiction. Once this five percent jurisdictional threshold has been met the Act requires the court to enjoin the assessment of discriminatory taxes in any amount. The district court has explicit jurisdiction to issue injunctive relief notwithstanding the Tax Injunction Act of 1937, 28 U.S.C. § 1341.[*]

IV. The Case Below.

The district court observed that Georgia law requires uniform valuations of all property and described in detail Georgia's appellate procedure in property tax cases. The court then distinguished this situation from 4R Act cases involving de jure discrimination, observing that "there is

[*] 28 U.S.C. § 1341:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

no conflict between the Georgia Revenue Code and section 306." The court further noted that "any contention by the railroads that the State Board of Equalization misapplied either federal or state law as such law relates to the tax structure imposed on the railroads would be without merit, since state law requires, and the State Board of Equalization so recognized, that uniformity of taxation is required."

After noting that the state board had considered state and federal directives "that railroad property must be treated equally with commercial and other industrial property," the court observed that the railroads' complaint did not allege "any sinister plot on the part of the State Department of Revenue to circumvent either section 306 or the Georgia statutes by purposefully valuing their properties at a value higher than the actual true market value; the complaint merely alleges that the valuations and resulting assessments are incorrect. Thus narrowed, the focus of the railroads' complaint is whether the valuation placed upon their property is, indeed, the fair market value."

The district court concluded that abstention was proper under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). It justified restraint by noting that federal intervention could disrupt effectuation of the state policy of uniform taxation which in this case parallels federal law. The state's special expertise in valuation and assessment, the matter at hand, was also of relevance. The court added as a third reason for its abstention "the fact that protracted litigation could result because . . . the remedy which this court can provide is severely limited."[9]

[9] The district court concluded that restrictions on the power of federal courts to assess or levy taxes under *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed.2d 66 (1961), "seri-

V. The Appeal.

A. *Burford* abstention in general.

" 'The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to ajudicate a controversy properly before it.' " *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1062-63, 3 L.Ed.2d 1163 (1959)); *accord Reetz v. Bozanich*, 397 U.S. 82, 86, 90 S.Ct. 788, 790, 25 L.Ed.2d 68 (1970); *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S.Ct. 391, 395, 19 L.Ed.2d 444 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 1324, 12 L.Ed.2d 377 (1964).

*Burford v. Sun Oil Co.* and a group of arguably similar cases have been assembled into a uneasy category of abstention to which *Burford* lends its name.[10] Although the contours of *Burford*-type abstention are ill-defined, the doctrine when applicable is invoked where the "exercise of federal review of the [state law] question in a case and in similar cases would be disruptive of state efforts to

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ously restrict the measure of relief available in the district court." Congress disagrees. *See, e.g.*, S.Rep. No. 630, 91st Cong., 1st Sess. 1, 12-13 (1969). Although the issue is not directly before us and is not necessary to our decision, we believe *Moses Lake Homes* is distinguishable. If, prior to a state assessment, a district court enjoins the assessment of property in excess of a certain judicially determined value the court is not assessing a tax. It is still incumbent upon the state's taxing agency to formally assess the rail property at some value within the terms of the district court's injunction. Even were *Moses Lake Homes* applicable we believe the court's equity powers are sufficient to grant substantial and effective relief when dealing with the discriminatory tax as an entirety. The court's equity powers are also sufficient to eliminate the incentives to engage in protracted litigation either party might otherwise have.

[10] The other two categories are *Pullman*-type abstention and

establish a coherent policy with respect to a matter of substantial public concern." *Nasser v. City of Homewood*, 671 F.2d 432, 439 (11th Cir.1982) (quoting *Colorado River*, 424 U.S. at 814, 96 S.Ct. at 1244); *see also BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 954-55 (5th Cir. 1977). Because *Burford* abstention results in the dismissal rather than stay of federal proceedings as well as in the "refusal to exercise federal jurisdiction in an entire class of cases, it is perhaps the most potent device in" the abstention area. *Nasser v. City of Homewood*, 671 F.2d at 440; *BT Investment Managers*, 559 F.2d at 955.

B. The propriety of abstention under the 4R Act.

Whether *Burford* should be applied to cover challenges by rail carriers to discriminatory state property tax assessments under section 11503 is a case of first impression in this circuit. The posture of the state and federal interests is significantly different in this case than in previous abstention cases. Because we decide that Congress meant unconditionally to ensure a federal forum for section 11503 claims, we conclude that the statute bars abstention in cases alleging de facto discrimination as well as de jure.

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*Younger*-type abstention. Under the *Pullman* category, abstention may be appropriate where the resolution of a federal constitutional question properly before the federal court "is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law." *Harman v. Forssenius*, 380 U.S. 528, 534, 85 S.Ct. 1177, 1181, 14 L.Ed.2d 50 (1965); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Abstention in a *Pullman* situation "may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Id. Younger*-type abstention counsels against intervention by federal courts to restrain state criminal or quasi-criminal proceedings. *E.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1974); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

1. The continued vitality of equitable restraint in suits involving state taxes.

Both Congress and the federal courts have acknowledged that the ability to administer fiscal affairs via taxation free of interference from the federal judiciary is of primary importance to a state's economical well-being. Federal courts had long practiced abstention or its equivalent in deference to this state interest by the time Congress passed the Tax Injunction Act, 28 U.S.C. § 1341. *See, e.g., Matthews v. Rodgers*, 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932); *First National Bank v. Board of Commissioners*, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784 (1924); *Singer Sewing Maching Co. v. Benedict*, 229 U.S. 481, 33 S.Ct. 942, 57 L.Ed. 1288 (1913); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 29 S.Ct. 426, 53 L.Ed. 796 (1909). The Tax Injunction Act was intended to codify this pre-existing federal equity practice and to ensure more uniform adherence to the underlying principles of comity by erecting a jurisdictional bar to supplement the existing equitable restraint. *See generally United Gas Pipe Line Co. v. Whitman*, 595 F.2d 323 (5th Cir.1979).[11]

The equitable doctrine has not been replaced by section 1341. Since enactment of the provision courts have applied an equitable policy of non-interference to suits involving state taxes when the suits are not specifically within section 1341. *See, e.g., Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 S.Ct. 177,

[11] Under Tax Injunction Act jurisprudence the central focus of the federal inquiry has been the adequacy of the state remedy. *Id.* It is obvious from the statutory language that this is the only possibility of gaining federal jurisdiction in a case falling within section 1341. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 73-74, 97 S.Ct. 219, 222-223, 50 L.Ed.2d 227 (1976).

70 L.Ed.2d 271 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); *United Gas Pipe Line*, 595 F.2d at 326. The justification given by courts for refusing to hear state tax cases outside the literal scope of section 1341 involves a determination that congressional intent counsels the expansion followed by a decision that equitable restraint is appropriate under the circumstances.[12] *See California v. Grace Brethren Church*, 457 U.S. 393, 412-13, 416-17, 102 S.Ct. 2498, 2510-11, 2512-13, 73 L.Ed.2d 93 (1982); *Fair Assessment*, 454 U.S. at 107 & n. 4, 109-10, 102 S.Ct. at 181 & n. 4, 182-83; *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522-27, 101 S.Ct. 1221, 1234-36, 67 L.Ed.2d 464 (1981); *Great Lakes*, 319 U.S. at 300-01, 63 S.Ct. at 1074; *United Gas Pipe Line*, 595 F.2d at 326.

2. The congressional guarantee of a federal forum for section 11503 suits.

Without doubt the well-being of the nation's railroads is essential to its economic health. In passing section 11503 Congress acted "to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract

[12] We refuse to accept either the state board's argument that the judiciary should exercise its equitable discretion regardless of contrary congressional intent and the railroad's argument that the courts are prevented from exercising equitable discretion because of a contrary expression of congressional intent. Because equitable considerations require the courts to consider competing federal and state policies we find that the court is not bound to follow congressional intention and hear any case for which Congress has provided jurisdiction especially when the subject matter of a particular case coming under such a jurisdictional grant is at the periphery of congressional attention. However, we also realize that the function of the legislative branch is to create law and policy and legislative grants of jurisdiction and their legislative histories are strong evidence of federal policy which we are charged by equity as well as constitutional considerations to consider.

carrier transportation property." S.Rep. No. 630, 91st Cong., 1st Sess. 1 (1969).

In hearings on the provision Congress heard testimony from the National Association of Tax Administrators on behalf of the states to the effect that state court remedies were "adequate to deal effectively with assessment discrimination cases" and that state tax departments made "substantial progress in eliminating discrimination" and that federal injunctive relief would interfere with states' abilities to classify property to carry out state policies promoting better land use, location of industry, homestead tax relief and old age property tax relief. *See* S.Rep. No. 630 at 8. Nevertheless Congress determined that strong federal policies demanded a federal forum as well as a federal substantive remedy. *Id.* at 6-7. Congress realized that the Tax Injunction Act, which prohibits district courts from enjoining state taxing activity where state law provides a plain, speedy, and efficient remedy in the state's courts, had the undesirable effect of closing the doors of the federal courts to railroads affected by discriminatory taxation where the state's remedies were neither plain, speedy, nor efficient. S.Rep. No. 630 at 6-8; S.Rep. No. 1483, 90th Cong., 2d Sess. 6 (1968). Therefore Congress provided in section 11503 a specific exemption to the Tax Injunction Act.

The state board argues that, in states such as Georgia where de jure discrimination does not exist, state and national policies are aligned and the federal judiciary should require taxpayers to use the state's remedies. We do not agree. The legislative history and broad language of the Act show Congress possessed a general concern with discrimination in all of its guises. *See* S.Rep. No. 630 at 6 (favorably quoting S.Rep. No. 445, 8th Cong., 1st

Sess. 466 (1961)); S.Rep. No. 630 at 15; S.Rep. No. 445 at 458.

Section 11503 suits differ from ordinary taxpayer suits in that the potential class of section 11503 plaintiffs is limited to rail carriers. Exercise of federal jurisdiction thus will not transform the district court into " 'a source of appellate review of all state property tax classifications.' " *Fair Assessment*, 454 U.S. at 114, 102 S.Ct. at 185 (quoting *Fair Assessment in Real Estate Association v. McNary*, 478 F.Supp. 1231, 1234 (E.D.Mo.1979)). There are, however, other concerns. A judicial appraisal of valuation techniques could well affect the state's choice of future assessment methods. Further, although the railroads are relatively few in number and tend to pool their litigation efforts their combined tax bill is substantial. "During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget . . . ."[13] *California v. Grace Brethren Church*, 457 U.S. at 410, 102 S.Ct. at 2509 (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n. 17, 91 S.Ct. 674, 699 n. 17, 27 L.Ed.2d 701 (1971)). Litigation of section 11503 claims could also allow the railroads to "escape the ordinary procedural requirements imposed by state law." *Id.*

The extensive legislative history of the 4R Act and its numerous predecessor bills makes it clear that Congress thoroughly considered the effects the Act would have on state taxation policies and practices. After weighing these

[13] In this case the district court enjoined the state board's issuance of an order assessing taxes. Thus Georgia has been unable to assess and collect even the undisputed portion of the taxes. Under Georgia law interest on past due taxes does not begin to accrue until after such an order is issued. If the district court does not grant appropriate equitable relief the railroads stand to gain a substantial and undeserved profit from their resort to federal court.

effects, Congress concluded that both a federal remedy and a federal forum were necessary to further the strong national policy of protecting interstate commerce from the disruptive effects of discriminatory state and local taxation of railroad property. *See, e.g.*, S.Rep. No. 630 at 6-8; S.Rep. No. 1483 at 6. Congress provided for both solutions in the resulting law.

"[A] court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Patsy v. Board of Regents*, 457 U.S. 496, 501-02, 102 S.Ct. 2557, 2560-61, 73 L.Ed.2d 172 (1982). The legislative history of section 11503 demonstrates that Congress intended to carve out an exception not only to the Tax Injunction Act, but also to the underlying doctrine of equitable restraint in the narrow area of discriminatory taxation of railroads. Congress meant to guarantee a federal forum for railroad suits, and only an exemption from abstention in all its forms would accomplish this purpose. Since Congress has spoken, it is not our province to alter the balance Congress struck in providing a federal forum for rail carrier claims of tax discrimination under section 11503.

*Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981), does not require a different result. In a suit for damages under section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, taxpayers claimed that disparate assessment of their newly improved real property deprived them of equal protection and due process of law. Section 1983 ordinarily provides an immediate federal forum for citizens whose constitutional or federal rights allegedly have been denied by any state despite the presence of an an adequate state forum. *See McNeese v. Board of Educa-*

*tion*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Viewing the case as a clash between "two divergent lines of [statutory] authority," 454 U.S. at 105, 102 S.Ct. at 180, the Supreme Court ruled that the principle of comity together with section 1341 require abstention in the face of jurisdiction under section 1983.

Section 11503 involves no such collision with the Tax Injunction Act. Its legislative history, unlike that of section 1983, evinces a congressional intent to exempt taxpayer plaintiffs from the Tax Injunction Act as well as from the comity principle. Further, because the economic due process claims in *Fair Assessment* fell at the extreme periphery of the concern behind section 1983, abstention in that context left the vital core of section 1983 protections intact. Abstention here, in contrast, would rob the jurisdictional grant of section 11503 of all meaning, since the railroad plaintiffs belong to the small class of direct beneficiaries contemplated by Congress and seek precisely the tax relief the section affords. Finally, the potential for wholesale federal litigation of state taxpayer claims, very real under section 1983, is nonexistent under section 11503.

*Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), exemplifies an instance in which a jurisdictional statute properly took precedence over the equitable restraint doctrine and its statutory counterpart, section 1341. The Supreme Court gave effect to a district court decision enjoining Montana's collection of certain vendor licensing and sales taxes from Indian merchants. In deciding that abstention in the case was improper the Court relied on a jurisdictional statute, enacted ten years earlier, which reflected a congressional

intent to provide Indian nations with a federal forum for certain civil actions. *See* 28 U.S.C. § 1362. Neither the statute nor its legislative history mentions any exemption from the Tax Injunction Act. The Court concluded however that the statute conferred jurisdiction despite the command of the Tax Injunction Act because the statute, as construed, extended to the tribes the common law exception to section 1341 which allows the United States and its instrumentalities to sue in federal court to complain of "unconstitutional state exactions." 425 U.S. at 470-74, 96 S.Ct. at 1639-42 (quoting *Department of Employment v. United States*, 385 U.S. 355, 358, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966)).

The railroads in this case as the Indian groups in *Moe* are beneficiaries of recently enacted nonexclusive grants of jurisdiction. Both groups reside near the center of the concern underlying the federal policy reflected in the laws enacted. The particular case which the railroad carriers press here bears more directly on the narrow situation contemplated by Congress than does the cause in *Moe* on the much broader grant of section 1362. *See Moe*, 425 U.S. at 473, 96 S.Ct. at 1641. The express words of exemption contained in the legislative history of section 11503 are a further recommendation not present in *Moe* against abstention.[14] We conclude that the recent, speci-

[14] It is the state board's contention that the role of an independent judiciary is to apply its own notions of comity and federalism in disregard of those expressed by Congress in legislation. As our opinion in this case indicates federal courts have never applied the abstention doctrines in a vacuum. These doctrines are shaped by competing state and federal interests and both interests must be considered. The supremacy clause requires the courts to grant great deference to Congress' direct, unequivocal and constitutional exercise of its legislative power. This case presents no compelling reason for the court to ignore Congress' intention and refuse to exercise its duly conferred jurisdiction.

fic expression of congressional intent and national policy reflected in section 11503 requires federal district courts to hear section 11503 cases brought before them. We find that the district court in abstaining abused its discretion, reverse and remand to district court for consideration on the merits.[14]

VI. The Cross-Appeal.

The state board argues on cross-appeal that the injunction entered by the district court has prevented it from obtaining the undisputed portion of the railroads' tax bill. The state board also argues that the railroads will be unjustly enriched should the state not receive interest on the undisputed amount. We agree and order the district court to modify its injunction to allow the state to immediately assess and collect the undisputed amount of taxes without waiving its entitlement to the disputed amount. Furthermore the district court should require the railroads to pay interest on the undisputed amount of taxes and on any additional amount the court finds not in violation of section 11503 and the state chooses to assess and collect. The interest is to be assessed from the date such taxes would have become due *but for the district court's injunction* and at the rate set by Georgia law for

[14] When the district court decided this case there was only one other court which had directly addressed the abstention issue. The other court abstained. *Missouri Pac. R.R. v. Tax Div.*, 504 F.Supp. 907 (E.D.Ark.1980). Since that time there have been several more. To our knowledge none other than the district court in this case has chosen to abstain. *See Burlington N.R.R. v. Bair*, Civ. No. 83-100-A (S.D.Iowa filed June 17, 1983); *Atchison, T. & S.F. Ry. v. Arizona*, 559 F.Supp. 1237, 1248-49 (D.Ariz.1983); *Trailer Train Co. v. State Bd. of Tax Comm'rs*, No. IP 82-45-C (S.D.Ind. Nov. 3, 1982); *Southern Pac. Transp. Co. v. California*, No. C 81-4848 SW (N.D.Cal. Sept. 1, 1982); *Atchison, T. & S.F. Ry. v. Lennen*, 552 F.Supp. 1031, 1037-38 (D.Kan.1982) (disapproving the result reached by the district court in this case).

taxes due but not paid from that date until payment is actually made.

REVERSED and REMANDED WITH INSTRUCTIONS.

## PART II

## DISTRICT COURT DECISION

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

SOUTHERN RAILWAY COMPANY;
THE ALBAMA GREAT SOUTHERN RAILWAY COMPANY;
CENTRAL OF GEORGIA RAILROAD COMPANY;
THE GEORGIA NORTHERN RAILWAY COMPANY;
GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY;
LIVE OAK, PERRY AND SOUTH GEORGIA RAILWAY COMPANY;
TENNESSEE, ALABAMA AND GEORGIA RAILWAY COMPANY;
SEABOARD COAST LINE RAILROAD COMPANY; and
LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
*Plaintiffs,*

vs.

STATE BOARD OF EQUALIZATION of the State of Georgia;
W. E. STRICKLAND, ARTHUR K. BOLTON, WILLIAM M. NIXON, JR., MARCUS E. COLLINS, and JIMMY LESTER, Members of the State Board of Equalization of Georgia, and their successors in office;
W. E. STRICKLAND as Commissioner of Revenue of the State of Georgia, and his successors in office,
*Defendants.*

CIVIL ACTION No. C 81-695 A

## ORDER

This is an action seeking to restrain and enjoin the defendants from assessing the plaintiffs' property for purposes of ad valorem taxation for the 1979 tax year pursuant to a decision of the State Board of Equalization of the State of Georgia rendered on April 15, 1981, to the extent that such assessments are allegedly contrary to 49 U.S.C. § 11503, from certifying and distributing such assessments to counties and other local taxing authorities in Georgia, and from taking any other steps to collect allegedly excessive ad valorem taxes from the plaintiffs that are based upon the State Board of Equalization's decision. The plaintiffs also seek a declaratory judgment that the defendants' proposed assessments of the plaintiffs' property for the 1979 tax year and the certification and distribution of such assessments violate 49 U.S.C. § 11503. The court initially granted the railroads' motion for a temporary restraining order, and on May 11, 1981, the court entered a preliminary injunction, the terms of which had been agreed upon by the parties. Several motions are before the court, but the court's decision to abstain makes it unnecessary to consider the other pending motions.

In 1976 Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, reprinted in [1976] U.S. Code Cong. & Ad. News 14 (sometimes referred to as the "4R Act") for the purpose of promoting the revitalization of the railway system of the United States. Recognizing that one of the major problems faced by the railroads was the heavy and often discriminatorily high taxation of railroad property by various states, Congress prohibited as "an unreasonable and unjust discrimination against, and an undue burden on, interstate com-

merce," a state's assessment

> for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property, and the ratio which the assessed value of all other commercial and industrial property and the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

Section 306 of the 4R Act, from which the above quotation comes, was enacted into law on February 5, 1976; however, the effective date of section 306 was set for three years after that date. Section 306 was originally codified at 49 U.S.C. § 26c, but before the effective date Congress recodified that section as part of its revision of the Interstate Commerce Act, and that section is now codified at 49 U.S.C. § 11503. (The language of 49 U.S.C. § 11503 as codified differs from the language of section 306 as enacted; however, the court finds these changes insubstantial for purposes of the question of whether the court should abstain.)

Prior to the enactment of the 4R Act, railroad company efforts to remedy what even Congress perceived as rather pervasive tax discrimination by resort to the federal courts had generally been unsuccessful because of the jurisdictional limitations on federal judicial authority contained in 28 U.S.C. § 1341, which prohibits federal district courts from enjoining the "assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Traditionally, as a matter of comity, federal courts have been reluctant to find state remedies inadequate. *See* Tully v. Griffin, Inc., 429 U.S. 68, 97 S.Ct. 219 (1976). This reluctance had worked a particular

hardship upon railroads, since under many state laws a challenge to a tax assessment had to be brought against numerous local tax collecting authorities rather than against a central tax assessing department. Recognizing this deficiency, Congress provided under section 306 that notwithstanding 28 U.S.C. § 1341 the district courts of the United States would have jurisdiction "to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments" as might be necessary to prevent, restrain, or terminate unlawful assessments, provided, however, that such jurisdiction would not be exclusive of state jurisdiction and provided further that no relief could be granted under section 306 "unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction."

I. Factual Background of the Case *Sub Judice* and Georgia Assessment Procedure

All non-exempt real and personal property held within the state of Georgia on January 1 of each year is subject to ad valorem taxation.[1] Non-utility property subject to ad valorem taxation in Georgia is appraised and assessed for ad valorem tax purposes (following a valuation return made by the taxpayer) by the county tax commissioner or receiver of the county wherein the property is located. Ga. Code Ann. § 91A-1018. Utility property subject to

[1] The revenue title of the Georgia Code was revised and became effective on January 1, 1980, as Title 91A of the Georgia Code; prior to this revision and recodification, the revenue title was found at Title 92 of the Georgia Code. Since there were no substantive changes in the pertinent statutes relevant to this litigation, citation will be to the revised and recodified title.

ad valorem taxation, on the other hand, is appraised and assessed for ad valorem tax purposes (following a valuation return by the utility) by the Commissioner of the State Department of Revenue. Ga. Code Ann. § 91A-2211. The property of railroad companies is defined as public utility property for purpose of ad valorem taxation and is thus assessed and taxed by the Commissioner of the State Department of Revenue. Ga. Code Ann. § 91A-102(c).

The railroads are required to make annual returns for the value of their property by March 1 and to set forth those values as of the preceding January 1. Ga. Code Ann. § 91A-2201. The Commissioner then assesses the amount of the railroad's property in each county. Ga. Code Ann. § 91A-2211. Each year the Commissioner must then submit his completed digest to the State Board of Equalization so that it can determine whether the assessments are "reasonably apportioned between the several tax jurisdictions and are reasonably uniform with the value set on other classes of property throughout the state." Ga. Code Ann. § 91A-217(b). After final approval by the State Board of Equalization of the Digest of Proposed Assessments, the Commissioner within ten days notifies the railroad of the proposed assessment and informs the railroad that it has ninety days in which to appeal. Ga. Code Ann. § 91A-217(c). If dissatisfied with the assessment, the railroad may appeal to the State Board of Equalization, and this appeal follows "as far as is practical, the procedure for an appeal by a taxpayer to his county board of equalization." Ga. Code Ann. § 91A-2204; *see* Ga. Code Ann. § 91A-1449. Following a hearing before the State Board of Equalization and a decision by that board, the railroad has thirty days in which to appeal that decision to the superior court; "[t]he

procedure provided by law for applying for and granting appeal from the probate court to the superior court shall apply as far as suitable to the appeal." [2] Ga. Code Ann. §§ 91A-217(d), -255(b).

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[2] The confusing procedure of referencing appeal procedures to various other code sections sometimes makes it difficult to discern which procedure is to be used at the different stages of the proceedings. Apparently, an appeal of the assessment by the Revenue Commissioner to the State Board of Equalization is the same procedure as provided for an appeal from a county commissioner to a county board of equalization. However, a different procedure is then utilized for an appeal from the State Board of Equalization instead of the appeal procedure provided for in the case of an appeal from the county board of equalization. In an appeal from a county board of equalization to the superior court, the appeal is a de novo action. Ga. Code Ann. § 91A-1449(f)(3). In the case of an appeal from a ruling by the Commissioner (and this is the procedure to be followed in an appeal from a State Board of Equalization, *see* Ga. Code Ann. § 91A-217(d)), there is no such explicit provision that the appeal is a de novo action. This confusion is made only slightly less confusing by the fact that the Georgia Supreme Court has ruled that a statutory provision empowering Georgia courts to reajudicate questions of law and fact that have already been committed to the administrative discretion of county boards of zoning appeals is unconstitutional. Bentley v. Chastain, 242 Ga. 348 (1978). Since assessment by either the State Revenue Commissioner or a County Tax Commissioner and a subsequent determination by either a State or County Board of Equalization is clearly an administrative procedure, this court believes that there is little doubt that any review by a State Superior Court would not constitute a de novo proceeding. However, the mere fact that the review is not de novo in no way means that the railroads have been deprived of an adequate remedy in the state proceedings. *See, e.g.*, Alabama Public Service Commission v. Southern Ry., 341 U.S. 348, 349, 71 S.Ct. 762, 768 (1951), wherein the court stated:

> The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity . . . .
>
> As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. (Footnote omitted.)

Each of the plaintiff railroads returned its property as required by Georgia law, and the property of each was assessed by the State Revenue Commissioner. Each railroad then filed its notice of appeal to the State Board of Equalization, contending that the proposed assessments violated the 4R Act in that railroad property was assessed at a value which was at a higher ratio to its true market value than the ratio of the assessed value of commercial and industrial property to their true market value.

The railroads' appeals were initially heard by a hearing officer appointed by the State Board of Equalization. This hearing was de novo in nature and involved the taking of substantial evidence by all parties on all issues raised by the railroads; the hearing lasted approximatley six days and produced a transcript exceeding 1400 pages, and all parties filed extensive post-trial briefs arguing the issues presented to the hearing officer. On January 5, 1981, the hearing officer filed his report in which he made certain findings and recommendations. The hearing officer expressly found that the discrimination prohibited by 49 U.S.C. § 11503 had not occurred.

In April 1981 the State Board of Equalization met to consider the recommendations of the hearing officer. The Board apparently voted to uphold the hearing officer in various respects, including the conclusion that the railroads had not shown any violation of section 306. On April 15, 1981, prior to the time that the Board of Equalization could enter a final order and terminate its proceedings, the plaintiffs filed this proceeding and obtained a temporary restraining order which had the effect of prohibiting any final determination by the State Board of Equalization.

II. Analysis of the 4R Act and Georgia Law

To place this case in its proper perspective it is essential to focus on the narrow question presented. Once the non-issues are extracted, with all their interesting, but irrelevant, applications and ramifications, the remaining issue is clearly seen as one more properly considered by the state courts rather than the federal courts.

First, the railroads do not allege that the taxing statutes of the State of Georgia are on their face discriminatory against the railroads and thus in violation of section 306. This the railroads could not argue, for the Georgia Constitution requires that "All taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Classes of subjects for taxation of property shall consist of tangible property in one or more classes of intangible personal property including money." Ga. Code Ann. § 2-4603. Ga. Code Ann. § 91A-1019 provides that all taxable tangible property shall be assessed at 40% of its fair market value. Georgia both statutorily and constitutionally mandates that railroad property be assessed at the same percentage that other commercial and industrial property is assessed and thus conforms to the requirements of section 306. Any violation of section 306 would also be a violation of the Georgia Constitution and the Georgia Code.

The Georgia requirement that railroad property be assessed at the same percentage of fair market value as other commercial and industrial property makes the case *sub judice* different from the Alabama, Arizona, and Tennessee cases cited by the railroads. In Arizona v. Atchison, Topeka and Santa Fe R.R., ___ F.2d ___, slip op. 2848 (9th Cir. June 12, 1981), the court noted that Arizona divided property into seven classes for the purpose

of property tax assessment. Railroad property, which fell under Class 1, was assessed at 60% of its full cash value. "Most, if not all, other commercial and industrial property was contained in Class 2, which was assessed at 50% of full cash value, and Class 3 which was assessed at 27% of full cash value." ____ F.2d at ____ (fn. omitted). In Tennessee v. Louisville & Nashville R.R., ____ F.2d ____, No. 79-1515 (6th Cir. March 20, 1981), the court found that Tennessee assessed railroad property at 55% of value whereas other commercial and industrial property was classified and assessed at 40% of value for real property and 30% for personal property. In Alabama Great Southern R.R. v. Eagerton, 472 F. Supp. 60 (N.D. Ala. 1979), *aff'd*, 629 F.2d 1347 (5th Cir. 1980), the court found that Alabama assessed railroad property at 30% of fair market value whereas other commercial and industrial property was assessed at 20% of fair market value. In each of these cases the federal courts were called upon to consider whether state revenue statutes conflicted with section 306 of the 4R Act and the congressional purpose and intent behind that Act. No such issue is present in the instant case, since there is no conflict between the Georgia Revenue Code and section 306, each requiring that railroad property be assessed at the same ratio to true market value as other commercial and industrial property.

Second, any contention by the railroads that the State Board of Equalization misapplied either federal or state law as such law relates to the tax structure imposed on the railroads would be without merit, since state law requires, and the State Board of Equalization so recognized, that uniformity of taxation is required.

Third, the railroads are not even alleging that the State

Board of Equalization failed to consider the requirement that railroad property must be treated equally with commercial and other industrial property. The hearing officer explicitly found that such equality and uniformity was required.

The issue before the court thus resolves itself into the simple question of whether the valuations placed upon the railroads' property and the subsequent assessment at 40% of such value were correct. It is true that if railroad property were valued at a price greater than its fair market value and then assessed at 40% of such valuation and if all other commercial and industrial property were valued at its fair market value and then assessed at 40% of that value, such assessments of the railroads' property would be in violation of section 306. However, such valuation would also be in violation of both the Georgia Constitution and the Georgia taxing statutes. Fairly read, the railroads' complaint does not allege any sinister plot on the part of the State Department of Revenue to circumvent either section 306 or the Georgia statutes by purposefully valuing their properties at a value higher than the actual true market value; the complaint merely alleges that the valuations and resulting assessments are incorrect. Thus narrowed, the focus of the railroads' complaint is whether the valuation placed upon their property is, indeed, the fair market value.

## III. Abstention

Abstention is a court-formulated doctrine under which a federal court may decline to exercise or may postpone the exercise of its jurisdiction over a pending proceeding and instead defer to a state court of a state administrative proceeding. The three types of abstention established

by the Supreme Court are as follows:

(1) *Pullman* abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of the relevant state law. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643 (1941).

(2) *Younger* abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal court jurisdiction has been invoked for the purpose of restraining certain types of state proceedings.[3] Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971).

(3) *Burford* abstention is appropriate in cases in which a federal decision could cause needless conflict with the administration by a state of its own affairs. Burford v. Sun Oil Company, 319 U.S. 315, 63 S.Ct. 1098 (1943).

The court finds that there is no basis for abstention under either the *Pullman* or *Younger* doctrines and finds that if abstention is appropriate at all in the instant case it would be appropriate only under the *Burford* rationale.

In *Burford* the Sun Oil Company challenged the validity of an order of the Texas Railroad Commission grant-

[3] *Younger* grew out of an attempt to have a federal district court enjoin an ongoing state criminal proceeding, and the *Younger* abstention doctrine has generally been applied only where state criminal proceedings were sought to be enjoined. The *Younger* abstention doctrine was made applicable to situations wherein injunctions were sought against state civil proceedings in Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200 (1975). However, the court in *Huffman* noted the three narrow exceptions wherein federal court intervention was justified: If the state proceeding is motivated by a desire to harass or was conducted in bad faith or if the challenged statute is flagrantly and patently unconstitutional. The defendants do not contend that the instant case falls within any of these narrow exceptions, and the court specifically finds that the *Younger* abstention doctrine is inapplicable to the instant case.

ing Burford a permit to drill several oil wells on a small oil field in Texas. Jurisdiction existed both by virtue of diversity of citizenship and because Sun Oil Company alleged that the Commission's order denied it due process of law. The Supreme Court acknowledged that the district court had jurisdiction over the subject matter of the action but went on to state that jurisdiction notwithstanding, a federal court could, in its sound discretion, refuse to enforce or protect legal rights, the exercise of which might be prejudicial to the public interest since it "is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." 319 U.S. at 318, 63 S.Ct. at 1099, quoting United State v. Dern, 289 U.S. 352, 360, 53 S.Ct. 614, 617 (1933). The Supreme Court reversed the Court of Appeals and affirmed the district court's order dismissing the complaint. In ruling that abstention was proper, the Supreme Court considered two factors which it felt warranted abstention: (1) federal intervention could result in a disruption of state public policy and (2) the Texas courts possessed a special expertise over the issue presented to the federal court.

With respect to the first factor, the federal courts, as well as Congress, have long recognized taxation that is one of the most basic and vital functions carried out by a state, for without the ability to tax, a state would be unable to provide any of the services for which it exists. Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070 (1943); *see also* the Anti-Injunction Statute, 28 U.S.C. § 1341. This court recognizes that section 306 provides a specific exemption to the Anti-Injunction Statute, but the court also notes that section 306 does not provide exclusive federal jurisdiction and

further notes that the basic evil which section 306 sought to remedy (unequal treatment of railroads under state statutes) is not found in Georgia, since Georgia law already provides that railroad property is to be treated the same as all other commercial and industrial property.

In the instant case, since state public policy mirrors federal public policy with regard to uniform taxation of railroad property, this court does not believe that it should unnecessarily intrude into the administration of a state's taxing policy and procedure. Such intrusion is especially inappropriate in the instant case, since administration and application of state policy will result in effectuation of federal public policy. Such a result would not have occurred in the cases involving the Alabama, Arizona, and Tennessee taxation statutes, and federal court intervention was appropriate in the cases arising in those states.

With respect to the second factor presented in *Burford*, this court notes that the Georgia Department of Revenue has special expertise over the matter of valuation and assessment. With no desire to belabor the point, the court points out again that neither the applicability nor validity of Georgia's taxation statutes is at issue. The only issue is whether railroad property has been properly valued and assessed. The Georgia Code provides an administrative procedure whereby railroads can challenge the valuation placed upon their property, and if the railroads are dissatisfied with this valuation, they can appeal through an administrative process and if still dissatisfied can appeal to the Georgia courts. This is substantially the same procedure provided to the litigants in *Burford*. In the case *sub judice*, the railroads began to pursue their administrative remedies after the initial val-

uation even though under section 306 the railroads could have come into federal court at that time before pursuing their administrative appeal. Although not determinative of the issue, this invocation of the state administrative appeal process is another factor which this court feels is worthy of consideration in deciding to abstain and thus not unnecessarily intrude in an ongoing administrative procedure on the state level.

Another reason for this court to abstain is the fact that protracted litigation could result because of the fact that the remedy which this court can provide is severely limited. This court cannot establish valuations and assessments for railroad property but can only determine if the state valuations conflict with section 306. If the court determines that the state valuations are incorrect, it can only send the proceedings back for another determination by the State Department of Revenue; if the railroads are dissatisfied with the new valuation, another appeal would follow, and this court could either only affirm or "remand." It is not the court's job to determine the value of the railroad property, but the court simply looks at the assessment of the railroad property and the assessment of other non-railroad property to determine if the assessments differ by more than 5%; only if the assessments vary by more than 5% could this court exercise jurisdiction under section 306. If this court determined that the railroad property had been valued at 104% of its actual value whereas all other commercial and industrial property had been correctly valued at 100%, this court would have no jurisdiction to provide any relief, whereas a state court would have the authority to require that the railroad property be valued and assessed in compliance with state law. Furthermore, even if this court found the variation to be greater than 5%,

it still would have no authority to make the correct assessments. The Supreme Court in clear, unambiguous language has stated, "Federal courts may not assess or levy taxes. Only the appropriate taxing officials of [the state or county] may assess and levy taxes . . . and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 81 S.Ct. 870 (1971). Under Georgia law assessment at 40% of fair market value is a purely administrative task once the valuation has been made, and this court would not be able to circumvent the clear mandate of *Moses Lake* by couching its judgment in terms of "valuing" railroad property instead of "assessing" railroad property.

For the foregoing reasons this court concludes that in the exercise of its discretion it should abstain in this case. Since a determination by the state courts will be conclusive, no purpose would be served by staying this action pending resort to the state appellate process, and this court, like the court in *Burford*, concludes that the complaint should be dismissed.

## IV. Injunction Pending Appeal

Because the court believes that the status quo with respect to these parties should be maintained pending an appeal by the plaintiffs to the Court of Appeals for the Fifth Circuit, the preliminary injunction previously entered in this case will remain in effect pending appeal. *See* Atchison, Topeka & Santa Fe Ry. v. Lennen, 640 F.2d 255 (10th Cir. 1981).

## IV. Summary

The court hereby abstains in the instant case, and the complaint is dismissed. However, the preliminary injunction previously entered shall remain in effect pending appeal.

SO ORDERED, this 27th day of August, 1981.

/s/ ROBERT L. VINING, JR.

ROBERT L. VINING, JR.
United States District Judge

## PART III

## DISTRICT COURT DENIAL OF MOTIONS TO RECONSIDER

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION**

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| SOUTHERN RAILWAY COMPANY, *et al.*, *Plaintiffs*, UNITED STATES OF AMERICA, *Plaintiff-Intervenor.* vs. STATE BOARD OF EQUALIZATION of the State of Georgia, *et al.*, *Defendants.* | CIVIL ACTION No. C 81-695 A |

### ORDER

The plaintiffs' motion to reconsider and vacate the court's order of August 27, 1981, in which this court exercised its discretion and abstained has been read and considered, and the same is hereby DENIED.

The intervenor's motion to alter or amend the order of August 27 has been read and considered, and the same is hereby DENIED.

The defendants' motion to modify order and judgment of August 27 has been read and considered, and the same is hereby DENIED.

SO ORDERED, this 9th day of October, 1981.

/s/ ROBERT L. VINING, JR.

ROBERT L. VINING, JR.
United States District Judge

## PART IV

## COMPLETE TEXT OF SECTION 306

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results

in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial

property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(3) As used in this section, the term—

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or indus-

trial use and which is subject to a property tax levy; and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.".

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